

# MANDATE

21-2100-cv

**BR Rest. Corp. v. Nationwide Mut. Ins. Co.**

**UNITED STATES COURT OF APPEALS  
FOR THE SECOND CIRCUIT**

## SUMMARY ORDER

RULINGS BY SUMMARY ORDER DO NOT HAVE PRECEDENTIAL EFFECT. CITATION TO A SUMMARY ORDER FILED ON OR AFTER JANUARY 1, 2007, IS PERMITTED AND IS GOVERNED BY FEDERAL RULE OF APPELLATE PROCEDURE 32.1 AND THIS COURT'S LOCAL RULE 32.1.1. WHEN CITING A SUMMARY ORDER IN A DOCUMENT FILED WITH THIS COURT, A PARTY MUST CITE EITHER THE FEDERAL APPENDIX OR AN ELECTRONIC DATABASE (WITH THE NOTATION "SUMMARY ORDER"). A PARTY CITING A SUMMARY ORDER MUST SERVE A COPY OF IT ON ANY PARTY NOT REPRESENTED BY COUNSEL.

At a stated term of the United States Court of Appeals for the Second Circuit,  
held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the  
City of New York, on the 8<sup>th</sup> day of April, two thousand twenty-two.

PRESENT: GUIDO CALABRESI,  
GERARD E. LYNCH,  
RAYMOND J. LOHIER, JR.,  
*Circuit Judges.*

**BR RESTAURANT CORP., DBA BRUNO'S  
RESTAURANTE ITALIANO,**

*Plaintiff-Appellant,*

V.

No. 21-2100-cv

NATIONWIDE MUTUAL INSURANCE  
COMPANY,

*Defendant-Appellee.*

1  
2 FOR PLAINTIFF-APPELLANT:

MICHAEL S. COLE, Cole Hansen  
3 Chester LLP, New York, NY

4  
5 FOR DEFENDANT-APPELLEE:

MARCI GOLDSTEIN KOKALAS,  
6 Goldberg Segalla LLP, Newark,  
7 NJ

8 Appeal from a judgment of the United States District Court for the Eastern

9 District of New York (Gary R. Brown, *Judge*).

10 UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED,

11 AND DECREED that the judgment of the District Court is AFFIRMED.

12 BR Restaurant Corp. ("BR") appeals from the August 26, 2021 judgment of

13 the United States District Court for the Eastern District of New York (Brown, *L*)

14 dismissing its case against Nationwide Mutual Insurance Company

15 ("Nationwide") for breach of contract. BR claims that Nationwide improperly

16 denied insurance coverage for the business losses it suffered after New York

17 State imposed restrictions on on-premises dining in its efforts to curb the

18 COVID-19 pandemic. The District Court dismissed BR's amended complaint

19 under Federal Rule of Civil Procedure 12(b)(6) after concluding that BR was not

20 entitled to coverage under its insurance policy with Nationwide for any business

1 losses that resulted from restrictions on how the premises are used, where there  
2 was no direct physical loss or damage to property, whether the business's  
3 premises or other neighboring property. We assume the parties' familiarity  
4 with the underlying facts and the record of prior proceedings, to which we refer  
5 only as necessary to explain our decision to affirm.

6 We review de novo the District Court's dismissal under Rule 12(b)(6). See  
7 Biro v. Condé Nast, 807 F.3d 541, 544 (2d Cir. 2015). "Under New York law, an  
8 insurance contract is interpreted to give effect to the intent of the parties as  
9 expressed in the clear language of the contract." 10012 Holdings, Inc. v. Sentinel  
10 Ins. Co., Ltd., 21 F.4th 216, 220 (2d Cir. 2021) (quotation marks omitted).  
11 Ambiguities in the contract are resolved "in the insured's favor and against the  
12 insurer." U.S. Fid. & Guar. Co. v. Annunziata, 67 N.Y.2d 229, 232 (1986). But  
13 "[w]here the provisions of [a] policy are clear and unambiguous, they must be  
14 given their plain and ordinary meaning, and courts should refrain from  
15 rewriting the agreement." Id. (quotation marks omitted).

16 BR relies on two of the policy's provisions. First is the policy's "Civil  
17 Authority" provision, which covers losses of business income that stem from

1 civil authority action that “prohibits access to the [insured] premises due to  
2 direct physical loss of or damage to property, other than at the [insured]  
3 premises, caused by or resulting from any Covered Cause of Loss.” App’x 29.  
4 Second is the “Business Income” provision, which covers actual loss of business  
5 income caused by “the necessary suspension of [the business’s] operations  
6 during the period of restoration,” where the suspension “must be caused by  
7 direct physical loss of or damage to property at the described premises.” App’x  
8 27 (quotation marks omitted). We conclude that the plain text of these  
9 provisions makes clear that either direct physical loss or property damage is a  
10 necessary predicate to coverage.

11 Urging otherwise, BR contends that these provisions also cover the loss of  
12 business income sustained because of New York’s restrictions on on-premises  
13 dining. We disagree. “[U]nder New York law the terms ‘direct physical loss’  
14 and ‘physical damage’ . . . do not extend to mere loss of use of a premises, where  
15 there has been no physical damage to such premises.” 10012 Holdings, 21 F.4th

1 at 222.<sup>1</sup> Coverage under these provisions therefore requires “actual physical  
2 loss of or damage to the insured’s property.” Id.; see also Roundabout Theatre  
3 Co. v. Cont’l Cas. Co., 751 N.Y.S.2d 4, 8 (1st Dep’t 2002) (describing the term  
4 “direct physical loss” in an insurance policy as “clearly and unambiguously  
5 provid[ing] coverage only where the insured’s property suffers direct physical  
6 damage”).

7 In a letter filed pursuant to Rule 28(j) of the Federal Rules of Appellate  
8 Procedure, BR concedes that 10012 Holdings is factually on point. It contends,  
9 however, that we misapplied New York law in that decision. We disagree, and  
10 we note that no subsequent developments in the New York courts have called  
11 that decision into question. We are therefore bound by our prior decision in  
12 10012 Holdings. See Glob. Reinsurance Corp. of Am. v. Century Indem. Co., 22  
13 F.4th 83, 100–01 (2d Cir. 2021) (recognizing our general rule that precedential  
14 panel decisions are binding unless and until they are overruled by the Court in

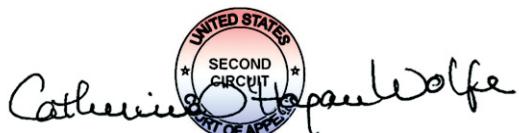
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<sup>1</sup> BR argues that the District Court improperly relied on federal decisions in issuing its own decision in this case and therefore somehow contravened Erie R. Co. v. Tompkins, 304 U.S. 64 (1938). But the District Court in fact properly applied New York law to resolve this case.

1 banc or by the Supreme Court). Because BR alleges nothing more than the  
2 losses it suffered as a result of restrictions on its use of the premises, the District  
3 Court properly dismissed the Amended Complaint.<sup>2</sup>

4 We have considered BR's remaining arguments and conclude that they are  
5 without merit. For the foregoing reasons, the judgment of the District Court is  
6 AFFIRMED.

7 FOR THE COURT:  
8 Catherine O'Hagan Wolfe, Clerk of Court



The image shows a handwritten signature of Catherine O'Hagan Wolfe in black ink. To the right of the signature is a circular official seal of the United States Court of Appeals for the Second Circuit. The seal contains the text "UNITED STATES" at the top, "COURT OF APPEALS" at the bottom, and "SECOND CIRCUIT" in the center, flanked by two stars.

A True Copy

Catherine O'Hagan Wolfe, Clerk

United States Court of Appeals, Second Circuit



The image shows a handwritten signature of Catherine O'Hagan Wolfe in black ink. To the left of the signature is a circular official seal of the United States Court of Appeals for the Second Circuit. The seal contains the text "UNITED STATES" at the top, "COURT OF APPEALS" at the bottom, and "SECOND CIRCUIT" in the center, flanked by two stars.

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<sup>2</sup> The district court also briefly analyzed the virus exclusion and determined in a footnote that the exclusion also barred BR's claims. BR Restaurant Corp. v. Nationwide Mut. Ins. Co., 2021 WL 3878991, at \*2 & n.1. While BR takes issue with that determination on appeal, we need not address any such potential alternative ground for dismissal because we conclude that 10012 Holdings forecloses BR's claim.